Supreme Court, U.S.
FILED

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Case No. _____

In The
Supreme Court of the United States
October Term 1996

JAMES I. LARK, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition For Writ Of Certiorari
To The First District Court of Appeal
For the State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a defendant entitled to a remedy when law enforcement authorities deliberately block the timely and reasonable efforts of defense counsel to gather probative evidence essential to the preparation of a defense?

II. Is a defendant's Constitutional protection against double jeopardy implicated when a prosecutor intentionally and directly comments before the jury on the defendant's invocation of his rights to silence and counsel, and when the comments were made to inflame the jury to return an improper conviction?

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EDITOR'S NOTE

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OPINION BELOW

On April 9, 1996, the First District Court of Appeal, State of Florida entered its Judgment affirming Petitioner's conviction. The opinion was reported as *Lark v. State*, 671 So. 2d 824 (Fla. 1st DCA 1996) *rev. denied* ____ So. 2d _____ (Fla. 1996)("*Lark II*") and adopted the presentation of facts from the opinion of the appeal after the first trial reported as *Lark v. State*, 617 So. 2d 782 (Fla. 1st DCA 1993) *rev. denied* 626 So. 2d 208 (Fla. 1993)("*Lark I*"). The published opinions are attached hereto as Appendices "A" and "B" respectively. Lark sought and was denied discretionary review by the Florida Supreme Court on August 30, 1996. A copy of the unpublished order is attached hereto as Appendix "C."

JURISDICTION

The decision to be reviewed was rendered by the First District Court of Appeal, State of Florida on April 9, 1996. Jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1257. Because the Florida Supreme Court denied Lark's Petition for Discretionary Review by Order dated August 30, 1996, the decision of the First District Court of Appeal was one rendered by "the highest court of a state in which a decision could be had."

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.

U.S. CONST. amend. V:

> No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

This petition seeks review of the decision of the First District Court of Appeal, State of Florida, affirming Lark's convictions for one count of first degree premeditated murder and one count of manslaughter, and which denied him a remedy for the undisputed deliberate interference by law enforcement with defense counsel's timely efforts to collect evidence. The decision below was rendered following retrial after remand from the first appeal. The opinion under review incorporates the statement of facts provided in the opinion

from the first appeal.[1] The citations herein are to the record below, to the opinion below, or to the reported opinion from the first appeal.

On the afternoon of August 29, 1989, James I. "Skipper" Lark, an alcoholic, visited his stepmother, Carole Lark, at her home in Panama City, Florida. This home had been the family residence of Lark's deceased father. Upon Lark's arrival, Carole Lark was not at home, but a friend, Wesley Butler, was on a riding mower in the driveway. Shortly afterwards, Carole Lark arrived, and the three visited. Carole Lark soon made a phone call to Margaret Bailey, Lark's girlfriend, for the purpose of explaining to Bailey that Lark was too drunk to drive and would require assistance in getting home. *Lark I*, 617 So. 2d at 784. Carole Lark told Bailey that she had never seen Lark in such bad shape. *Lark II*, 671 So. 2d at 827 (Appendix "A"). Bailey drove immediately to the Lark home. *Lark I*, 617 So. 2d at 784.

A conversation then ensued between Skipper Lark, Carole Lark, Bailey and Butler, primarily about their recollections of years past when Lark's deceased father developed the family business at Panama City Beach. Around 4:15 p.m., Lark excused himself to go to the bathroom. He returned a few minutes later carrying a pistol. Bailey thought

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[1] *Lark v. State*, 617 So. 2d 782, 784 (Fla. 1st DCA 1993) *rev. denied* 626 So. 2d 208 (Fla. 1993)(Appendix "B").

the gun was one from Lark's father's collection and that Lark wanted to talk about it. Instead, Lark began firing rapidly. Shots struck Carole Lark, who fell to the floor, and Butler, who ran outside and collapsed in the driveway. Bailey, alarmed and frightened for her own safety, ran from the house, caught a ride to a nearby resort, and informed a security person of the events. *Id.*

In approximately half an hour, emergency medical personnel arrived at the home followed by deputies from the Bay County Sheriff's Department. The deputies took Skipper Lark into custody and recovered the pistol from EMT Danny Harris. *Id.* Harris testified that Lark was "blasted out of his gourd." *Lark II*, 671 So. 2d at 827. Carole Lark was dead at the scene and Butler died from his wounds later that evening at a local hospital. *Lark I*, 617 So. 2d at 784-85.

At the Bay County Jail, sheriff's investigators Dufresne and Nolin took Lark to an office and began a taped interview. Lark's attorney, Bob Hughes, arrived at the jail within minutes after the interview began. After meeting with Lark, Hughes asked that the questioning be stopped, and at 6:30 p.m. he requested Investigator Dufresne to allow Lark to have a blood test. In addition to the blood test, Hughes also asked for permission to have his client seen immediately by Dr. Clell Warriner (a respected psychologist who was known to the State as one frequently appointed by the court to make competency and/or state of mind determinations) to examine Lark at the jail as to his mental condition. (R 429-30, R 499-500, R 505).

Dr. Warriner, who lived less than five minutes from the jail, had been contacted by telephone and was available to examine Lark at the jail. (R 472-73, R 503). This request was also denied. (R 473). Hughes then requested permission to have Lark seen by any psychologist, psychiatrist, or other physician of the government's choosing. Sheriff's personnel denied these requests. *Id.* Thus, Hughes was confronted with a situation in which police officers, having custody of his client, would not allow access for expert examination, nor would they permit blood to be drawn at a nearby hospital, nor would they permit a nurse at the jail to draw the blood. *See Lark I*, 617 So. 2d at 785.

During the next hour, Alton Paulk, a 14th Circuit prosecutor, arrived at the jail. Paulk required Lark to consent in writing to having blood drawn (which consent gave the State custody and control of the evidence collected), and Lark did so. (R 437). After that, sheriff's personnel took Lark to Bay Medical Center where, after he arrived, Hughes discovered that the deputies did not bring a legal blood kit. Finally, at 9:05 p.m. a blood sample was drawn at Bay Medical Center, which upon analysis revealed a .23 percent blood alcohol level as of that time. *Lark I*, 617 So. 2d 784-85. Hughes had requested that the emergency room doctor be permitted to examine Lark while he was at the hospital, but Paulk refused this request. *Lark II*, 671 So. 2d at 825. In fact, Paulk gave the transporting deputies specific instructions that they were not to permit Lark to be examined by the emergency room doctor. (R 296-98, R 440-41, R 474). Senior Assistant State Attorney Paulk testified

at the hearing on Lark's motion to dismiss that he knew defense counsel's requests were made for the purpose of preparing a defense but he refused to allow Lark to be examined at the jail by Dr. Warriner, or for Lark to be examined by the emergency room doctor, because

> [o]nce the tests were done I would consider them evidence, assuming the privilege did not attach. If the privilege attaches it's evidence to no one except the client.

(R 460). The next day Lark was transported and admitted to the hospital with symptoms of alcohol withdrawal. *Lark I*, 617 So. 2d 784-85.

In the course of his defense, Lark presented no evidence that he did not shoot and kill both victims. His defense centered upon voluntary intoxication and lack of premeditation necessary to support a conviction for first degree murder. Lark's state of mind was the only issue. *Id.* at 788. The prosecution adduced no evidence of motive. *Id.*

In the first trial experts opined that at a high level of intoxication one is not able to function mentally and reflect upon what he is doing even though he may be able to function physically. As a result of the turn of events after Lark's arrest, i.e. the government's denial of Hughes' requests to allow Lark to be examined by a psychologist, psychiatrist, or the emergency room doctor and for a timely blood sample, the only direct

evidence of the degree of intoxication was that derived from the blood sample drawn after 9:00 p.m. *Id.* Dr. Warriner testified at a pretrial hearing that if the State had permitted him to examine and test Lark as defense counsel requested he could have determined Lark's level of intoxication "[r]ather well from a psychological point of view." (R 517). Lark was convicted of first degree murder for the death of Carole Lark and second degree murder for Butler.

In his first appeal, Lark challenged the deliberate interference as a violation of his right to counsel and right to prepare a defense. Although holding that "law enforcement authorities may not with impunity deliberately block the timely and reasonable efforts of defense counsel to gather evidence essential to the preparation of a defense," the first panel did not attempt to decide whether a violation occurred. *Lark I*, 617 So. 2d at 783. On remand prior to the second trial, Lark filed with the trial court his Motion for Remedy for Interference with Right to Counsel and Right to Prepare a Defense, wherein he asserted that the trial court should provide an appropriate remedy. *Lark II*, 671 So. 2d at 825. The trial court found that the actions of the State violated Lark's constitutional rights, but denied him any remedy on the ground that there was available "comparable evidence by other reasonable means to establish his state of mind at the time of the offense." *Id.* On retrial Lark was convicted of manslaughter for the death of Butler, but he was again convicted of first degree murder for the death of Carole Lark.

Also in the first appeal, the court reversed the convictions and remanded the case for a new trial. *Lark I*, 617 So. 2d at 786-88; (R 2150). One basis for the court's decision was that the State Attorney had directly and repeatedly suggested to the jury that Lark had invoked his right to silence and counsel the evening of his arrest. *Id.*

On remand, Lark moved the trial court to discharge him on the ground that the State Attorney's improper comments were made intentionally to afford the State a better chance of obtaining a conviction and thus implicated Lark's double jeopardy rights. (R 2261). The trial court denied the motion holding that the State Attorney's improper conduct did not rise to the level of intentional misconduct required to implicate the double jeopardy clause. (R 2314).

On November 3, 1995, the District Court filed an opinion which, without recitation of precedent or other authority, affirmed on the ground that, as to the interference with right to counsel issue,

> "[w]hile we note that it might have been helpful to the defense to have available expert testimony as to appellant's condition at the time period in question . . . Appellant failed to demonstrate on retrial that the lesser alternatives available to him would have been inadequate."

Lark filed a timely Motion for Rehearing. On April 9, 1996,

the District Court denied the motion but substituted for its original opinion a new one which replaced the "lesser alternatives" language with "certain alternatives " and again affirmed, on the ground that at retrial Lark "decided to forego some of the means the trial court noted were open to him to develop his defense." *Lark II*, 671 So. 2d at 826. Lark filed a timely Notice for Review with the Florida Supreme Court on May 8, 1996, and it was denied August 30, 1996. *See* Appendix "C."

ARGUMENT

I. Is a defendant entitled to a remedy when law enforcement authorities deliberately block the timely and reasonable efforts of defense counsel to gather probative evidence essential to the preparation of a defense?

This case strikes at the heart of our adversarial system of justice. The trial court has found that law enforcement deliberately interfered with the timely and reasonable efforts of Lark's attorneys to gather important evidence. The appellate court has conceded that the evidence sought would have been helpful to the presentation of a state of mind defense. *Lark II*, 671 So. 2d at 826. But no court has assessed and meted out any remedy for this constitutional violation.

Upon Lark's arrest, the State, with dozens of officers scouring the crime scene, mobilized to build a case against Lark. Simultaneously, Lark's attorney's arrived at the jail and began trying to gather evidence on the issue of Lark's state of mind. Their efforts were stonewalled by the State's denying access for a psychological, psychiatric, or medical examination and refusing to permit the drawing of a timely blood sample. The State allowed a delayed blood sample only after it coerced an agreement from lark that the sample would be held as State's evidence. And once the much delayed blood sample was permitted, prosecutors made certain that Lark was not examined by the emergency room physician. Thus, Lark was prevented from adequately preparing and presenting an

effective state of mind defense, and at both trials the State used the defendant's lack of evidence to its tactical advantage. By denying Lark any remedy for this undisputed violation of Lark's Sixth Amendment Right to Counsel, the courts of the State of Florida have permitted the State to "stack the deck" against Lark and have forced him to trial with only the evidence the State permitted him to have.

The right to the assistance of counsel means that counsel must be permitted to fully and fairly participate in the adversary fact-finding process. *Herring v. United States*, 422 U.S. 83, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). Here, Lark's attorney's were denied that opportunity. This denial was not the result an innocent error, negligence, or happenstance, but the result of a calculated and successful effort by law enforcement, including the State Attorney's Office, to intentionally deny Lark access to favorable evidence on the sole issue in dispute. "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation," *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). Moreover, when the deprivation results from government interference at a critical stage of the proceeding, prejudice is presumed. *United States v. Cronic*, 466 U.S. 648, 660, 104 S.Ct. 2039, 2046-47, 80 L.Ed.2d 657 (1984). Despite the clear mandates from this Court, the Florida courts have refused to provide Lark any remedy.

Lark respectfully submits that this court should accept

review of this case (1) to remedy the serious injustice particular to this matter, and (2) to rectify the inevitable perception that must arise from the reported opinions in this case that law enforcement *may* with impunity deliberately block the timely and reasonable efforts of defense counsel to collect evidence and prepare a defense.

The opinion from the first appeal, which the court below adopted by reference and by quotation, sets forth the indisputable rule of law that "law enforcement authorities may not with impunity deliberately block the efforts of defense counsel to gather probative evidence essential to the preparation of a defense." *Lark I*, 617 So. 2d at 783. The trial court applied this rule and found as a matter of fact that law enforcement authorities did violate Lark's constitutional rights, but then denied him any remedy. Although acknowledging that the law enforcement misconduct left Lark in an inferior position vis-a-vis the evidence he sought on the sole and closely contested issue at trial, his state of mind, and thereby consigned him to mere "alternatives," the appellate court, too, has denied him any remedy. Thus the decision below signals to law enforcement that even where its deliberate misconduct targets an accused's most precious of constitutional rights, his right to counsel, no remedy will be measured out for the injury and no punishment will be meted out for the transgression. At every turn Lark has sought a remedy for the deliberate violation of his right to counsel; it now falls to this court to provide it.

II. Is a defendant's Constitutional protection against double jeopardy implicated when a prosecutor intentionally and directly comments before the jury on the defendant's invocation of his rights to silence and counsel, and when the comments were made to inflame the jury to return an improper conviction?

In the first trial the State Attorney for the Fourteenth Judicial Circuit of Florida directly and improperly commented to the jury on the invocation of Lark's right to silence in the following exchange with Lark witness Bob Hughes:

> Q. What is the legal obligation of the Bay County Sheriff's office to give you a blood sample on an individual after you have walked into a room and told those officers that man *does not want to talk to you he invokes his constitutional rights under the Constitution of the United States*?
>
> A. That really isn't what I said, Mr. Appleman.
>
> Q. What is the legal authority *after you have invoked his constitutional rights* to require them to do it? You have told him you don't want him to talk to him anymore haven't you?

(T 1662-63)(e.s.).

These comments were the primary reason the convictions were reversed in the first appeal. *See Lark I*, 617 So. 2d 782; Appendix "B." On remand, Lark moved the trial court to dismiss the charges and discharge Lark because the comments were made intentionally and the double jeopardy clause barred a retrial. The trial court ruled that the State Attorney's improper comments were intentional but that they "do not rise to the level of intentional misconduct by the prosecution so as to preclude a retrial of this defendant."[2] (R 2314).

The record below conclusively demonstrates that the State Attorney's comments were calculated to put inappropriate and unfairly prejudicial material before the jury. Three circumstances demonstrate the intentional character of the State Attorney's actions. First, his legal basis for making the comments was completely unfounded. Second, he knew that there were no facts to support his unfounded legal position. And third, the comments were not made impulsively but deliberately as the result of a scheme hatched six months before trial.

At the first trial, Lark sought to elicit evidence of the requests made by his attorneys to show that evidence of his state of mind was available upon arrest and that the State

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[2] In essence the trial court held that prosecutors are free to engage in some unspecified level of intentional misconduct without recourse.

intentionally prohibited him from obtaining this crucial evidence. The State Attorney claimed that evidence of the requests would open the door to the invocation of Lark's Fifth and Sixth Amendment rights, contending that when Lark invoked his constitutional rights the State was *prevented* from allowing the state of mind examinations requested by defense counsel. On appeal the appellate court categorically rejected the State's position by citing *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)(the taking of a nonconsensual and warrantless blood sample for alcohol testing does not violate a defendant's right against self incrimination). *Lark I*, 617 So. 2d at 787-788.[3]

Secondly, the evidence shows that the invocation of Lark's right to silence played no part in the decision to deny the requests of Lark's counsel. Investigator Dufresne admitted in testimony at the pretrial motion hearing that Hughes' actions had nothing to do with the decision to deny defense counsel's requests. (R 411-13, R 417-18). This admission explains why the State Attorney did not cross-examine Investigator Dufresne on that subject at trial -- he knew that he had no testimony to support his unfounded legal position. The only way the State Attorney could get the invocation of Lark's right to silence before the jury was to tell them himself, which is exactly what he did.

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[3] The State Attorney's malevolent purpose is evidenced by the fact that Lark put him on notice of the *Schmerber* holding in a legal memorandum served six months prior to trial. (*See* R 1173, 1193-95).

And finally, the State Attorney first fabricated his argument during the evidentiary hearing on Lark's Motion to Dismiss six months before trial. Then, at trial, he announced in advance the direct and comprehensive way he intended to explore the invocation of Lark's rights:

> I tell you what, Judge, when he asks it, I'm coming right back on the constitutional standards. He invoked his constitutional rights and they couldn't get anything....
>
> ... Because my position is when they start going in to Mr. Hughes and talking about it, they just opened the hole [sic] cotton-picking door, and I am going to go through it from one step to the end, all the way....
>
> If you allow it to go in, the door is open and I am going to go after it.... I'm going to go after every word that was said.

(T 1590, 1592-93, 1606). His comments before the jury were clearly not spontaneous but carefully calculated.

In *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), this Court held that intentional misconduct by a prosecutor can implicate double jeopardy. The language in the Court's opinion suggests that its holding is limited to "goaded mistrial" situations and to no other malevolent

purpose.

Lark respectfully submits that from the citizen/defendant's perspective he is indifferent to whether his first proceeding was invalidated by mistrial or later by appellate reversal. The essence of Lark's double jeopardy protection is that the State is entitled to one opportunity to prosecute him, and having abused that opportunity by engaging in a calculated scheme to improperly poison the jury against him, it should not be heard to complain when it does not receive a "second bite at the apple."

Lark respectfully submits that this Court should review this case to clarify its holding in *Oregon v. Kennedy*, *supra*, and thereby vindicate the double jeopardy protection from intentional prosecutorial misconduct whatever its subjective purpose.

CONCLUSION

When the State of Florida was confronted with this high profile homicide, it abandoned its duty to fairly prosecute and instead blocked the timely and reasonable efforts of Lark's attorneys. This misguided prosecution continued at trial where the State obtained unfair advantage by intentionally and graphically trumpeting to the jury Lark's invocation of his rights to silence and counsel. Lark objected to these practices but the Florida courts have denied him a remedy.

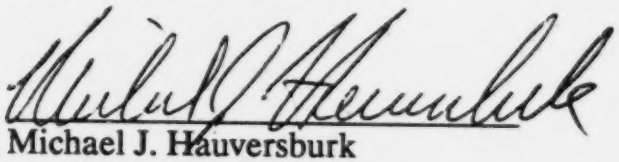
If given the full benefit of his attorney's efforts, Lark may well have been indicted for second degree murder or manslaughter or acquitted of first degree murder. At every turn he has sought a remedy for this deliberate constitutional violation; it now falls to this court to provide it.

Unaddressed, the decisions below strike a devastating blow to the constitutional rights of the citizens of the State of Florida. It is said that parchment barriers provide no defense to tyranny; that the strength of our rights is found in the zeal and jealousy with which they are enforced. For a want of jealousy or zeal below, a citizen's right to counsel as manifested in the right of the attorney to collect evidence and prepare a defense has been practically eviscerated.

A deliberate violation was found to have occurred. The State derived a tactical advantage from its violation. No remedy has been afforded to Lark. The reported opinions

below signal to prosecutors and law enforcement that an accused's right to counsel is no barrier to the deliberate and injurious misconduct recited there. Law enforcement are free to cut corners and break rules as prosecutorial convenience suggests, and obtaining convictions has displaced finding truth as the *raison d'etre* of the criminal justice system. Here, the government's success in blocking defense counsel's efforts to prepare a defense netted it an advantage at trial and retrial; the appellate court decision makes that success complete by denying a remedy to Lark or a punishment to the State. Lark respectfully submits that this court must accept review of this case to vindicate the right to counsel in its full and uncompromised form.

Respectfully submitted,



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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

"A" Published Opinion of Florida First DCA, dated April 9, 1996, *Lark v. State*, Case No. 94-1753; 671 So. 2d 824; (*Lark II*).

"B" Published Opinion of Florida First DCA, dated April 9, 1996, *Lark v. State*, Case No. 91-1641; 617 So. 2d 782; (*Lark I*).

"C" Order of Florida Supreme Court Denying Petition for Discretionary Review, dated August 30, 1996; (*Lark II*).

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671 So.2d 824, Lark v. State, (Fla.App. 1 Dist. 1996)
*824 21 Fla. L. Weekly D865

James I. LARK, Jr., Appellant,
v.
STATE of Florida, Appellee.
No. 94-1753.
District Court of Appeal of Florida,
First District.
April 9, 1996.

Defendant was convicted of first and second-degree murder by the Circuit Court, Bay County, Don T. Sirmons, J., and he appealed. The District Court of Appeal, Kahn, J., 617 So.2d 782, reversed and remanded. On remand, defendant was again convicted of first-degree murder and of manslaughter by the Circuit Court and he appealed from denial of remedy for state's prior deliberate interference with his counsel rights. The District Court of Appeal, Joanos, J., held that remedy requested by defendant for state's alleged interference with his counsel rights, which would have stricken premeditation language from indictment or, in alternative, have barred state from presenting any premeditation evidence, was too drastic a remedy for state's misconduct.

Affirmed.

CRIMINAL LAW k700(8)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
110k700(2) Disclosure or Suppression of Information
110k700(8) Sanctions; proceedings on objections.
Fla.App. 1 Dist. 1996.

Remedy requested by first-degree murder defendant for state's alleged deliberate interference with his counsel rights in blocking defense attorney's efforts to gather evidence supporting voluntary intoxication defense, which would have struck premeditation language from indictment or, in alternative, have barred state from presenting any premeditation evidence, was too drastic a sanction, where state's conduct, though it may have prevented defendant from obtaining blood alcohol tests at time somewhat closer to shootings, did not prevent defendant from otherwise presenting voluntary intoxication defense through testimony of those who observed him after shootings or by having expert extrapolate backwards based on blood alcohol tests administered somewhat later. U.S.C.A. Const.Amends. 5, 6.

An appeal from the Circuit Court for Bay County. Don T. Sirmons, Judge.

James B. Fensom of Barron, Redding, Hughes, Fite,

Bassett & Fensom, P.A., Panama City; Henry M. Coxe, III, Jacksonville; and Michael J. Hauversburk, Panama City, for Appellant.

Robert A. Butterworth, Attorney General and Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING AND CERTIFICATION

JOANOS, Judge.

On consideration of appellant's motion for rehearing and certification, and the state's response, we withdraw our opinion of November 3, 1995, and substitute the following opinion in its place. Appellant's motion is otherwise denied.

This is an appeal, following retrial, from convictions for first degree murder and manslaughter. We affirm. We address only one of the issues raised pertaining to the first degree murder conviction.

The basic facts of the case, and circumstances leading to the retrial, are set forth in this court's opinion in *Lark v. State*, 617 So.2d 782 (Fla. 1st DCA 1993). In his first appeal, appellant contended the State violated his constitutional right to counsel by deliberately blocking his efforts to gather evidence in support of his voluntary intoxication defense, and

he sought dismissal of the first degree murder charges on this basis. While *825 noting that "law enforcement authorities may not with impunity deliberately block the timely and reasonable efforts of defense counsel to gather probative evidence essential to the preparation of a defense," 617 So.2d at 783, this court determined dismissal of the charges would not have been an appropriate remedy, and did not attempt to decide whether a violation had occurred. The reversal of the first conviction was based in part on the prosecutor's improper comment on appellant's invocation of his constitutional rights.

On remand, prior to the second trial, appellant filed with the trial court a Motion for Remedy for Interference with Right to Counsel and Right to Prepare a Defense. After setting forth the facts surrounding the thwarted defense efforts to obtain an earlier blood alcohol level, psychological testing to determine level of intoxication, access to a psychiatrist to determine state of mind, or examination by an emergency room physician, appellant pointed out that this court, in its decision on appeal, held that "law enforcement authorities may not with impunity deliberately block the timely and reasonable efforts of defense counsel to gather probative evidence essential to the preparation of a defense," but stated that dismissal of the charges was not the appropriate remedy. He asserted that the trial court should decide the appropriate remedy, and that possible remedies included striking the premeditation element of the charge (count I as to Carole Lark) or suppressing the state's premeditation evidence collected from the time of the shooting.

In its order on the motion for remedy for interference with right to counsel, the trial court found that the actions of the state constituted a violation of appellant's rights, but denied the relief requested in the motion, stating that "the First District Court of Appeal opinion did not provide such a remedy and neither will this court." The trial court determined that there was available "comparable evidence by other reasonable means to establish his state of mind at the time of the offense." The trial court noted that there were numerous witnesses available to testify as to level of intoxication; the blood alcohol level test was, eventually, taken; "the Court notes the importance of keeping in mind that the Defendant's state of mind or level of intoxication was not what existed at the jail but what existed at the time the offense was committed"; at the original trial, defense experts placed the BAL at the time of the shooting at .35 to .40, thus evidence was available, on retrial, as to the BAL at the time of the shooting; appellant could use the testimony of defense attorney Hughes as to what happened at the jail to explain why no BAL was available before 9:05 PM; expert witnesses were available to testify as to the effect of the BAL at the time of shooting on appellant's ability to function and act.

The trial court also stated that in most cases involving issues of sanity at the time of the offense, mental health experts and other experts are called to give opinions as to sanity at the time of the offense, based on examinations that take place months after the offense, thus the time of the examination by the expert is not crucial to the issue. The court

further noted that "the remedy the Defendant is seeking has been granted by the District Court's opinion in that the State will not be permitted to bring out as rebuttal the Defendant's invocation of his constitutional rights when, and if, the defense offers testimony as to the non-availability of an earlier blood sample." The court finally determined that to grant the remedy requested, striking premeditation from count I or suppressing the state's premeditation evidence collected from the time of the shooting, would in effect grant a dismissal, which this court had declined to do.

On appeal, appellant argues that even though the trial court determined a violation of appellant's rights had occurred, in effect, it provided no remedy for that violation. Citing *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981), appellant asserts the remedy for a Sixth Amendment violation must be tailored to the injury. Appellant contends it was apparent from the beginning that the only issue at trial would be his state of mind, and that the record shows that the state's interference with preparation of the defense was intentional. He further asserts that the comparable evidence ***826** identified by the trial court was not comparable, and that when the defense attempted to use the alternatives mentioned by the court, the state took advantage of the limited nature of the evidence.

In response to the trial court's suggestion that numerous witnesses were available to testify about his level of intoxication, appellant argues that, with the exception of

Margaret Bailey and EMT Harris, the witnesses were all law enforcement personnel who attempted to understate his level of impairment. As to the eventual BAL and the availability of experts, appellant contends the experts were required to extrapolate backwards from 9 PM to 4:30 PM; they were "brutalized" on cross-examination at the first trial; and that the state suggested during closing arguments, without evidence, that his high BAL was due to his having taken another drink after the shooting. As to the suggestion that defense attorney Hughes could explain what occurred at the jail, appellant points out that explaining the nonexistence of evidence is not the same as having the evidence. As to the use of experts on the effects of a high BAL, appellant argues the trial court overlooked the inferiority of evidence of how people in general are affected by alcohol as opposed to how he specifically was affected by it. He asserts expert testimony based on a contemporaneous psychological examination would have been superior to expert testimony based on a later examination. Appellant points out that unlike most cases involving evidentiary improprieties, the violation here cannot be remedied by either suppressing evidence or requiring production of evidence.

In answer to appellant's argument, the state presents two basic arguments: that this court addressed this issue in appellant's first appeal, and that to grant the remedy requested would result in de facto dismissal of first degree murder charges, which this court earlier declined to do; and that appellant was not precluded from presenting his defense,

because, as the trial court pointed out, even if the BAL had been conducted immediately, experts would have been required to extrapolate backwards to determine the BAL at the time of the shootings. The state asserts the critical factor in assessing appellant's condition at the time of the shooting, based on the BAL level, was when he had his last drink. In this context, the state asserts that by presenting testimony indicating appellant's condition deteriorated between the time emergency assistance arrived and he arrived at the sheriff's office, the state provided evidence from which the jury could infer appellant had continued drinking after the shootings. The state contends that appellant presented no evidence that he stopped drinking before the murders and was thus at the highest BAL level at the time of the shootings, even though it was his burden to establish the affirmative defense of voluntary intoxication.

While we note that it might have been helpful to the defense to have available expert testimony as to appellant's condition at the time period in question, shortly after the shootings, and a series of BAL tests, beginning shortly after the shootings, so that it could be determined whether appellant's BAL was rising or falling, we conclude the trial court did not commit reversible error in failing to grant the relief appellant requested. We believe that in asking the trial court to prohibit presentation of evidence bearing on premeditation, or strike the element of premeditation from the charge, appellant asked for too drastic a remedy which would, in effect, have granted the dismissal of the first degree murder charge that was denied

in the previous appeal.

As set out above, the trial court suggested certain alternatives were available to develop the intoxication defense. On retrial, appellant apparently decided to forego some of the means which the trial court had noted were open to him to develop his defense. For example, on retrial appellant chose not to present the expert testimony, presented at the first trial through two defense witnesses, indicating his BAL at the time of the shootings could have been as much as .35 or .41. Only a witness for the state, Easter, testified on retrial as to BAL. Easter testified that appellant's BAL at 9PM was .23, but he was unable to extrapolate backwards to the time of the shooting, because it was critical to know the time the last drink was taken. In *827. addition, on retrial, appellant chose not to present the testimony of attorney Hughes, who had testified at the first trial as to the circumstances surrounding the inability to obtain an earlier BAL. Because of this court's decision on appeal of the first trial, appellant was free to put on Hughes' testimony without fear that the state would comment on the invocation of his constitutional rights.

Appellant complains that the state suggested to the jury without evidence that his high BAL was due to "post-shooting chug-a-lugging," however, we note that the state first made this suggestion, without objection, during rebuttal argument at the first trial. No effort was made before the second trial to preclude such a suggestion, and no objection was made when the same suggestion was made at closing during the second

trial.

Finally, some evidence was presented on retrial which could have supported the voluntary intoxication defense, and the jury apparently chose to disregard it. Bailey testified that Carole Lark told her on the telephone, before Bailey arrived and before the shootings took place, that she had never seen appellant in such bad shape; EMT Harris testified that when he arrived shortly after the shooting, appellant was "blasted out of his gourd."

For these reasons, we are unable to conclude that reversible error has been demonstrated in the trial court's failure to provide the remedy requested.

AFFIRMED.

WEBSTER, J., and REYNOLDS, Associate Judge, concur.

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617 So.2d 782, Lark v. State, (Fla.App. 1 Dist. 1993)
*782 18 Fla. L. Week. D1113

James I. LARK, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 91-1641.

District Court of Appeal of Florida,

First District.

April 28, 1993.

Rehearing Denied June 4, 1993.

Defendant was convicted of first and second-degree murder by the Circuit Court, Bay County, Don T. Sirmons, J. Defendant appealed. The District Court of Appeal, Kahn, J., held that: (1) permitting comment on defendant's invocation of constitutional rights was error, and (2) defendant's statement to police investigator asking who shot one victim was admissible to show declarant's state of mind.

Reversed and remanded.

1. JURY k33(2.15)
230 ----
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury

230k33(2) Competence for Trial of Cause
230k33(2.15) View of capital punishment.
Fla.App. 1 Dist. 1993.

State may not death-qualify jury in case in which it appears that death penalty may not be imposed as matter of law.

2. CRIMINAL LAW k393(1)
110 ----
110XVII Evidence
110XVII(I) Competency in General
110k393 Compelling Accused to Criminate Himself
110k393(1) In general.
Fla.App. 1 Dist. 1993.

Taking of nonconsensual and warrantless blood sample for alcohol testing does not violate defendant's right against self-incrimination. U.S.C.A. Const.Amend. 5.

3. WITNESSES k268(8)
410 ----
410III Examination
410III(B) Cross-Examination
410k268 Scope and Extent of Cross-Examination in General
410k268(8) Statements and affidavits by witness or others.
Fla.App. 1 Dist. 1993.

In murder prosecution in which voluntary intoxication was asserted as defense, testimony by former defense counsel indicating that sheriff's department refused to comply with request that blood sample be drawn, to explain unavailability of contemporaneous blood sample, did not open door to cross-examination of defense counsel by prosecutor on issue of defendant's invocation of constitutional rights.

4. CRIMINAL LAW k419(2.20)
110 ----
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.20) Then-existing state of mind or body.
Fla.App. 1 Dist. 1993.

Statement may be admissible to show declarant's state of mind, even though no exception to hearsay rule applies. West's F.S.A. Sec. 90.801(1)(a)1, (1)(c).

5. CRIMINAL LAW k419(2.20)
110 ----
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.20) Then-existing state of mind or body.
Fla.App. 1 Dist. 1993.

Murder defendant's question to police investigator, asking

who shot victim, was admissible to show defendant's state of mind, even if no exception to hearsay rule applied. West's F.S.A. Sec. 90.801(1)(a)1, (1)(c).

*783 James B. Fensom and Michael J. Hauversburk of Barron, Redding, Hughes, Fite, Bassett & Fensom, Panama City, and Henry M. Coxe, III of Coxe & Mitchell, Jacksonville, for appellant.

Robert A. Butterworth, Atty. Gen., Amelia L. Beisner, Asst. Atty. Gen., for appellee.

KAHN, Judge.

James I. "Skipper" Lark, Jr. appeals his convictions and sentences for first degree murder of Carole Lark and second degree murder of Wesley Butler. The state obtained two indictments charging murder in the first degree, and at trial sought the death penalty on each charge. As to the charge of killing Mr. Butler, the jury convicted Lark of second degree murder. On the Carole Lark charge the jury recommended mercy, and the trial judge imposed a life sentence. We reverse and remand for a new trial because the trial court allowed the prosecuting attorney to improperly comment to the jury that Lark invoked his constitutional rights to silence and counsel, and also because the trial court erred in excluding a response made by Lark when informed by a deputy sheriff of the charges against him (points three and four on appeal).

In Lark's first point he contends that the trial court should have dismissed the charges against him because the state deliberately obstructed his attorneys from adequately preparing and presenting an effective state of mind defense to the original first degree murder charges. Many of the factors upon which Lark bases this point are touched upon in our discussion under sections I and II, *infra*. It should be apparent that law enforcement authorities may not with impunity deliberately block the timely and reasonable efforts of defense counsel to gather probative evidence essential to the preparation of a defense. We need not, however, reach the question of whether such a violation occurred in the present case, since we have determined that on the facts before us dismissal of the charges would not, in any event, have been an appropriate remedy.

In his second point Lark relies upon our decision in *Reed v. State*, 496 So.2d 213 (Fla. 1st DCA 1986), *rev. denied*, 504 So.2d 768 (Fla.1987), to argue that the conviction must be reversed because the state pursued ***784** the death penalty in bad faith. In the present case, the state initiated the prosecution against Lark as a death penalty case. After nine months of discovery, Lark's attorneys, and the assistant state attorney assigned to the case, Mr. Harper, entered into a preliminary agreement whereby the state would not seek the death penalty in exchange for Lark's agreement to be tried before a six member jury. When the State Attorney, Mr. Appleman, became aware of the agreement, he fired Mr. Harper, personally assumed control of the case and publicly

announced he would seek the death penalty without regard to the preliminary agreement. Consequently, Lark filed a motion to compel enforcement of the agreement reached with Mr. Harper and a motion to dismiss on the ground that the state was seeking the death penalty in bad faith. The trial court denied both motions.

[1] As indicated by this court in Reed, the state will not be allowed to death-qualify a jury in a case in which it appears that the death penalty may not be imposed as a matter of law. Although the state continued to pursue two charges of first degree murder against Lark, and to seek the death penalty on each, the jury returned a verdict of second degree murder as to one charge, and the trial court declined to impose the death penalty as to the remaining charge. Accordingly, Lark may not again be subjected to the death penalty, *Wright v. State*, 586 So.2d 1024 (Fla.1991), nor may he be retried on a charge of first degree murder as to the count on which the jury convicted him of second degree murder. *H.L.A. v. State*, 395 So.2d 250 (Fla. 1st DCA 1981). Since there exists, therefore, no possibility that Lark will ever be tried before a death-qualified jury on these charges, we do not reach this point on appeal.

Lark's fifth point raises the sufficiency of the evidence of premeditation. We find that the evidence viewed in a light most favorable to the state was sufficient to present a question for the jury. *See Tibbs v. State*, 397 So.2d 1120, 1125 (Fla.1981), *affirmed*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) ("No appellate court should reverse a conviction or

judgment on the ground that the weight of the evidence is tenuous or insubstantial"). *See also Aguilera v. State*, 606 So.2d 1194 (Fla. 1st DCA 1992).

I

On the afternoon of August 29, 1989, Lark, an alcoholic, visited his stepmother, Carole Lark, at her home in Panama City. This home was the family residence of Lark's deceased father. Upon Lark's arrival, Carole was not at home, but another friend, Wesley Butler, was on a riding mower in the driveway. Shortly afterwards, Carole arrived and the three visited. Carole soon made a phone call to Margaret Bailey, Lark's girlfriend, for the purpose of explaining to Bailey that Lark was too drunk to drive and would require assistance in getting home. Ms. Bailey drove immediately to the Lark home.

A conversation then ensued between Skipper Lark, Carole Lark, Margaret Bailey and Wesley Butler. Primarily the four talked about their recollections of years past when Lark's deceased father developed the Miracle Strip Amusement Park and Shipwreck Island Water Park at Panama City Beach.

Around 4:15 in the afternoon, Lark excused himself to go to the bathroom. He returned a few minutes later carrying a pistol. At first Margaret Bailey thought the gun was one from Lark's father's collection, and that Lark wanted to talk about it. Instead, Lark began firing off rapid shots from the pistol. The shots struck Carole Lark, who fell to the floor, and Wesley Butler, who ran outside and collapsed in the driveway. Bailey, alarmed and frightened for her own safety, ran from the house,

caught a ride to a nearby resort, and informed a security person of the events.

In approximately half an hour, emergency medical personnel, as well as deputies from the Bay County Sheriff's Department, arrived at the home. The deputies took Lark into custody and recovered the pistol from Harris, an EMT. Carole Lark was ***785** dead at the scene, and Wesley Butler died from his wounds later that evening at a local hospital.

At the Bay County Jail, sheriff's investigators Dufresne and Nolin took Lark to an office and began a taped interview. Lark's private attorneys, including Mr. Robert Hughes, arrived at the jail within minutes after the interview began and Hughes met with Lark. After meeting with Lark, attorney Hughes asked that the questioning be stopped. Hughes further requested that Lark be taken to a local hospital in order to have blood drawn for a blood alcohol test. Hughes made this request at approximately 6:30 p.m. In addition to the blood test, Hughes also desired to have his client seen immediately by a psychologist, psychiatrist, or other physician. Sheriff's personnel denied the request, but eventually agreed to take Lark to the hospital to have blood drawn after Lark signed a document in which he consented to the procedure. At 9:05 p.m. a blood sample was drawn at Bay Medical Center, which upon analysis revealed a .23 percent blood alcohol level as of that time. The next day Lark was admitted to the hospital with symptoms of alcohol withdrawal.

Dr. William A. Sybers, Bay County Medical Examiner, performed autopsies of Carole Lark and Wesley Butler. The doctor determined that Mrs. Lark was shot three times and

died from a bullet wound to the heart. Butler was shot twice and died from loss of blood.

When informed that he was being charged with first degree murder in the deaths of both Mrs. Lark and Mr. Butler, Lark responded, "Who shot Wes Butler?" In the course of his defense, Lark presented no evidence that he did not shoot and kill both victims. His defense centered upon voluntary intoxication and, according to his view, lack of the degree of premeditation necessary to support a conviction for first degree murder. The prosecution adduced no evidence of motive.

At trial Lark introduced evidence that his whole blood alcohol level was .23 percent at 9:05 p.m. on the night of the shooting. Experts in the case testified that at the time of the shooting some four hours earlier, Lark's blood alcohol level would have been between .35 percent and .40 percent. Dr. Susan Danahy, a clinical psychologist and program director at the Friary, a recovery facility in Gulf Breeze, testified that at such a level one is not able to function mentally and reflect upon what he is doing even though he may be able to function physically. As a result of the turn of events after Lark's arrest, the only direct evidence of the degree of intoxication was that derived from the blood sample drawn after 9:00 p.m.

II

During the trial, attorney Hughes took the stand as a witness for the defense. Hughes testified that at 6:30 p.m. he requested Investigator Dufresne to allow Lark to have a blood test and a medical examination. Hughes explained to

Investigators Dufresne and Nolin the purpose of having the blood drawn, which was to preserve it for evidentiary purposes and to insure that the proper procedures were followed so the blood test results would ultimately be admissible. Hughes was certain his client could have his blood drawn at the Bay Medical Center by a person legally qualified to do the procedure. Sheriff's personnel declined the request to go to Bay Medical Center and suggested that a nurse from the jail would be available to draw the blood. After considering the matter for about half an hour, Hughes, who was at first reluctant to have the nurse draw the blood because of uncertainty about qualifications, told Dufresne to go ahead and have the nurse take a blood sample. At that point, Investigator Nolin told Hughes that the jail nurse would not be available to draw the blood. Hughes was confronted with a situation in which police officers, having custody of his client, would not permit blood to be drawn at a nearby hospital, nor would they permit a nurse at the jail to draw the blood.

During the next hour, an assistant state attorney, Mr. Paulk, arrived at the jail. Paulk required Lark to consent in writing to having blood drawn, and Lark did so at ***786** about 8:30 p.m. After that, sheriff's personnel took Lark to Bay Medical Center where he arrived sometime after 9:00 p.m.

Once at the hospital, Hughes found out that the Bay County deputies who had brought Lark over did not have the proper equipment required to preserve the blood. When a hospital technician asked if the deputies had a "legal kit," one

deputy responded that he did not, and that he would have to go to the Panama City Police Department to obtain one.

Lark now argues that he sought to elicit the foregoing evidence in order to show that evidence of his state of mind was available close to the time of the shooting and arrest, but that it was now lacking due to the state's denial of Mr. Hughes' requests. Lark wanted the jury to consider the lack of evidence in determining an appropriate verdict on the charges of first degree murder.

Before Hughes took the stand, the State Attorney, Mr. Appleman, told the court that questioning Hughes concerning the delay in drawing blood would open the door for the state to bring out Lark's invocation of his Fifth and Sixth Amendment rights. The state attorney argued that such would be proper because he believed that Lark's invocation of his constitutional rights prevented the state from thereafter acceding to Lark's request that his blood be drawn:

> MR. COXE [defense counsel]: The question was what did Mr. Hughes request.
>
> THE COURT: Right.
>
> MR. APPLEMAN: I'll tell you what, Judge, when he asks it, I'm coming right back on the constitutional standards. *He invoked his constitutional rights and they couldn't get anything ...*

* * * * * *

MR. APPLEMAN: Your Honor, essentially what he is trying to do is to take and talk about the blood samples with Mr. Hughes. He wants his cake and he wants to eat it, too. The whole thing stems down to this. You heard the testimony before in the prior hearing concerning this very issue. *Mr. Hughes on behalf of the defendant invoked his certain constitutional rights. And therefore, this officer couldn't talk to the defendant anymore, and if he wanted samples from him, he was going to have to go to a Court and get a court order to do it.* And now what they want to do is say hey, Mr. Hughes demanded this stuff, darn well knowing that I'm going to be restricted in any evidence that I present if you so rule about the fact that Mr. Hughes invoked the man's constitutional rights, and that's the issue you have confronting you. Do you let them have their cake and eat it, too?

Because my position is when they start going in to Mr. Hughes and talking about it, *they just open the whole cotton picking door, and I am going to go through it from one step to the end, all the way through Alton Paulk and conversations with Mr. Hughes to the fact that the defendant invoked his constitutional rights at the very beginning and that they couldn't get a blood sample, that the hampering of that blood sample wasn't due to the law enforcement agency.*

(emphasis added).

After hearing argument, the court eventually ruled that if Mr. Hughes testified, the state would be "entitled to come back and show by testimony what took place." This ruling set the stage for what transpired in cross-examination of Hughes by the State Attorney:

Q. [By Mr. Appleman]: Mr. Hughes, at what time did you arrive at the sheriff's office?

A. [Robert Hughes]: It was about 6:00 o'clock.

Q. For how long did you talk with the defendant after J.D. Nolin let you go into the room?

A. About 15 or 20 minutes.

Q. So somewhere around 6:00 o'clock you arrived and you went into the room a few minutes after 6:00, by 6:30, a quarter until 7:00 you had completed your conversations with the defendant?

A. I would say by 6:30.

*787 Q. 6:30. Which judges did you contact at 6:30 to get a court order to get this blood sample?

A. We didn't contact any judges.

Q. Which judges did you contact at a quarter till to get this

blood sample?

A. To be very frank with you, Mr. Appleman--

Q. No, answer the question I asked you.

A. We did not contact--

Q. Which judges did you contact?

A. We did not contact any judges nor did we attempt to contact any judges because it did not--it was inconceivable that anyone would refuse the request that we were making to have the blood drawn, so it didn't--it was not anything that was on the list that anybody would think of that you would need to do.

Q. *What is the legal obligation of the Bay County Sheriff's Office to give you a blood sample on an individual after you have walked into a room and told those officers that man does not want to talk to you, he invokes his constitutional rights under the Constitution of the United States?*

A. That really isn't what I said, Mr. Appleman.
Q. *What is the legal authority after you have invoked his constitutional rights to require them to do it? You have told him you don't want him to talk to him anymore, haven't you?*

THE COURT: Mr. Appleman, go ahead and let him answer the question.

THE WITNESS: I told Mr. Nolin that we would--I would like to talk to Mr. Lark for a while. Now, I then advised I think Mr. Nolin that Mr. Lark did not desire to carry on with his interview with him. At that point my responsibility as counsel for Mr. Lark was to begin to do the things that were necessary to prepare his defense, and the most immediate thing that came to mind was to have blood drawn so that we could preserve the blood alcohol level of this man at a time so that we wouldn't be here a couple of years later trying to decide whether he was too intoxicated or he was intoxicated or not. And so most of the time my experience has been--and I have been to the jails before back when I was in criminal--

MR. APPLEMAN: Your Honor, this is not even responsive to the questions asked. This isn't a narrative response. There was a question asked, and he is not responding to it. I ask that it be stricken.

THE COURT: I think you're getting a little beyond in terms of this last part of your response.
(emphasis added).

Lark now argues that the court erroneously allowed the State Attorney to improperly comment on Lark's invocation of his constitutional rights. Adding emphasis to his argument,

Lark points out that although State Attorney Appleman twice asked Mr. Hughes about the legal obligation of the sheriff's department after a defendant invokes "his constitutional rights under the constitution of the United States," Mr. Appleman, although objecting to the nonresponsiveness of Hughes' answer, never sought to elicit an answer to the questions. Our independent review of the transcript does not belie this observation.

[2] On appeal, the state has apparently realized that the defendant's invocation of his right to counsel would not, in and of itself, prevent the very same defendant from successfully requesting law enforcement officers to allow him to have a blood sample taken. Indeed, it has long been held that even the taking of a nonconsensual and warrantless blood sample for alcohol testing does not violate a defendant's right against self incrimination. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The state now argues that the questions asked by Mr. Appleman were not specific to Lark's case, but rather "dealt only with the obligations on law enforcement in *any* case where *a* defendant invokes his or her rights" (emphasis in original). Accordingly, goes the argument, since the prosecutor did not comment on Lark's right to remain silent, the argument on appeal must fail.

***788** The state next argues that, in any event, the questions were entirely proper in order to show the absence of bad faith on the part of the Bay County officers. This particular argument maintains that the deputies had a "good

faith" reason for denying Lark's demands because of their erroneous belief that the state could not compel a blood test after the defendant's invocation of his constitutional rights. Finally, argues the state, it was Lark's attorney who opened the door to the prosecutor's questions, by the testimony elicited from Mr. Hughes. Since the trial court had previously ruled he would allow the state to introduce evidence of Lark's invocation of his constitutional rights, Lark's lawyer should now be held accountable for his decision to question Hughes about the events at the jail. In making this argument, the state speaks of "invited error," citing *Pope v. State*, 441 So.2d 1073 (Fla.1983), and thereby accuses the defense of constructing the examination of Hughes so as to create built-in error and a trap for the prosecution.

[3] We categorically reject the state's arguments on this issue. The prosecutor's questions were not merely susceptible of being interpreted as referring to the defendant's invocation of his rights, *State v. Marshall*, 476 So.2d 150 (Fla.1985); but rather, such questions directly and repeatedly suggested to the jury that Lark had invoked his rights, and somehow his invocation of these rights had thwarted his own attempt to collect evidence and prepare for trial. "[A] defendant cannot be penalized for exercising his fifth amendment privilege." *State v. Burwick*, 442 So.2d 944, 947 (Fla.1983), *cert. denied*, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). A strict prohibition exists because evidence of a defendant's invocation of rights "creates an inference that the defendant is guilty of committing the criminal act." Id. In this case, the error was

particularly harmful because a primary issue before the jury involved the degree of Lark's criminality. The "guilty knowledge" type of inference that could be created by invocation of one's constitutional rights should be particularly discouraged in a case where the defendant's state of mind, or intent, is so central to the inquiry. We hold that the trial court erred by permitting comment on Lark's invocation of his constitutional rights during the cross-examination of Mr. Hughes, and further hold that the attempt by the defense to explain the nonavailability of a contemporaneous blood sample did not open the door to such cross-examination.

III

During examination of Investigator Dufresne, defense counsel asked Dufresne whether Lark made any response when told he was under arrest for the murder of Wes Butler. The prosecutor objected that the answer to the question would be "hearsay, it is a self-serving statement." Defense counsel proffered that Dufresne's response would be that Lark said, "Who shot Wes Butler?" and that the defense was not offering this statement for its truth, but solely as evidence illustrative of Lark's state of mind. The trial court sustained the hearsay objection, expressing the view that the defense had not come up with "an exception to the hearsay." We find error on this point because the proffered statement was not hearsay, and, accordingly, the presence of an exception to the hearsay rule was not relevant.

[4] Hearsay is an out-of-court statement offered to prove

the truth of the matter asserted. Section 90.801(1)(c), Fla.Stat. (1989). A statement is "an oral or written assertion." Section 90.801(1)(a)1, Fla.Stat. (1989). "If an out-of-court statement is offered in court to prove the truth of the facts contained in the statement, it is hearsay. If an out-of-court statement is not offered to prove the facts contained in the statement, it is not hearsay." Ehrhardt, *Florida Evidence*, Sec. 801.2 (1992 ed.) (footnotes omitted). Even though a particular statement might not be admissible to demonstrate its truth or falsity, this does not compel a conclusion that the same statement is not admissible to show the declarant's state of mind. *See Hunt v.* ***789.** *Seaboard Coastline R.R. Co.*, 327 So.2d 193 (Fla.1976).

[5] We find that Lark's query was not an oral assertion. *See United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir.1990) (while "assertion" is not defined in the Federal Rules of Evidence, the term has the connotation of a positive declaration). Indeed, the state has never identified what "truth" was attempted to be proven by Lark's question. In its brief, the state argues that we should affirm the trial court's decision to exclude Lark's response "because that statement was irrelevant to any material issue at trial." We note, however, that the prosecutor never argued relevance below, and it is apparent from our reading of the record that the trial court never considered this issue. Accordingly, we decline to consider this belated argument. We further decline the state's invitation to find that any error in refusing to admit the matter was harmless. We again note, as we did on the previous point, that Lark's state of mind was the central issue in this case. We

are unable to say that the state has carried its burden of proving beyond a reasonable doubt that the error was harmless. *State v. Diguilio*, 491 So.2d 1129 (Fla.1986). *See also Wise v. State*, 580 So.2d 329 (Fla. 1st DCA 1991).

REVERSED and REMANDED for a new trial.
ZEHMER and MICKLE, JJ., concur.

SUPREME COURT OF FLORIDA

Friday, August 30, 1996

JAMES I. LARK, JR.,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

Case No. 87,984
District Court of Appeal
1st District - No. 94-1753

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

KOGAN, C.J., OVERTON, SHAW, GRIMES and HARDING, JJ., concur.